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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DON M. MARTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 11, 1982

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QUESTION PRESENTED

Whether a criminal defendant may appeal a district court's dismissal of an indictment "without prejudice," when the dismissal is based upon the court finding prejudicial violations of defendant's Fifth and Sixth Amendment rights and when there is no practical means to prevent the same violations in a second investigation or trial.

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DON M. MARTIN,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Don M. Martin ("Martin") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A. It is reported at 682 F.2d 506 (5th Cir. 1982). The Order of the United States District Court for the Northern District of Texas (Abilene Division) is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1982. An Order extending time to file a Petition for Writ of Certiorari to and including November 11,

1982, was entered by Associate Justice Byron R. White on October 4, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

28 U.S.C. § 1291 (1976) provides, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

STATEMENT OF THE CASE

1. Summary.

Unlike other criminal cases that concern pretrial motions to dismiss, this case involves a district court order *terminating* the proceedings because it found prejudicial violations of a criminal defendant's fundamental rights under the United States Constitution.[1] The trial court dismissed the indictment here because it was based on the illegal disclosure of confidential and privileged information by Martin's attorney to the government. The

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[1] *Compare United States v. Hollywood Motor Car Co., Inc.*, —— U.S. ——, 102 S.Ct. 3081 (1982) (denial of motion to dismiss because of alleged vindictiveness by prosecution).

trial court held that the use of this information was plainly improper:

> When a lawyer testifies as to his communications with his client, as did [the lawyer] in this case, with no waiver from the client of the privilege, and at the same time gives testimony in behalf of his own interests and against those of his clients, such actions amount to a deprivation of effective assistance of counsel to the clients and a resulting denial of these clients' Fifth and Sixth Amendment rights.[2]

The dismissal of the indictment was "without prejudice" to the government's right to reindict if it could do so without the evidence provided by Martin's attorney. Martin appealed from the decision to the United States Court of Appeals for the Fifth Circuit. Despite the parameters for appellate jurisdiction established by this Court in *Perlman v. United States* (*"Perlman"*)[3] and *Helstoski v. Meanor* (*"Helstoski"*),[4] the Fifth Circuit dismissed the appeal for want of jurisdiction.

2. Facts Concerning the Indictment Against Martin.

In 1973, Martin created his own company, DOMA Corporation ("DOMA"), to engage in the purchase and sale of petroleum. In order to complete both the sale of his interest in an existing corporation and the formation of his own, new enterprise, Martin obtained the legal counsel of his first cousin and personal attorney, Reagan Martin, a practicing lawyer in Dallas, Texas.[5]

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[2] Appendix B at 13a (citation omitted).

[3] 247 U.S. 3 (1918).

[4] 442 U.S. 500 (1979).

[5] Vol. IV at 123-24. This citation and other citations to the record below are made by volume and page number (or exhibit number) to the official Record on Appeal to the United States Court of Appeals for the Fifth Circuit. Vol. IV is the transcript of the proceedings before the trial court.

From DOMA's inception, Reagan Martin was its Chairman of the Board, Vice-President and Secretary-Treasurer. In addition, Reagan Martin acted as its corporate counsel, a position he occupied until 1980. In this role, Reagan Martin maintained the corporate records and provided legal advice.[6] During the same period, he acted as personal counsel to Don Martin.[7]

In 1977, the United States Department of Energy ("DOE") initiated an audit of DOMA, which lasted into 1979.[8] One of the transactions reviewed by DOE involved Caprock Services Company, Inc. ("Caprock"), a wholly-owned subsidiary of DOMA. In July 1978, a customer of Caprock complained that Caprock had delivered one grade of oil to it and then billed it for a higher quality oil. Martin called his attorney, Reagan Martin, and told him, "[W]e have got a problem, and I think you ought to come out here and talk to me about it."[9] Reagan Martin agreed and went to DOMA's headquarters in Abilene, Texas. Martin explained the situation to Reagan Martin and asked his advice. It was ultimately decided that Reagan Martin would approach the disgruntled customer by himself to settle the problem.[10]

In the spring of 1979, DOE referred the Caprock transaction to the United States Department of Justice for criminal investigation. Because of this, Martin, Reagan Martin, and the two corporations became targets of prospective criminal proceedings. For this reason, they retained joint defense counsel.

Beginning in August 1979, four meetings were held involving joint defense counsel, Martin, and Reagan Mar-

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[6] Vol. IV at 124-25.

[7] Appendix B at 9a, 12a; Vol. IV at 159-60.

[8] Ex. 12.

[9] Vol. IV at 129.

[10] Ex. 4 at 33.

tin "for the purpose of preparing the joint defense of all of the parties with respect to the anticipated criminal charges."[11] The meetings not only involved exchanges concerning privileged facts, key document identification and analysis, identification of important witnesses, and tactical decisions; of even greater significance, Reagan Martin used these meetings to interrogate Martin about the particulars of the transaction underlying the criminal investigation.[12]

After the first three joint meetings, Reagan Martin voluntarily offered to give the government information concerning the Caprock transaction—including information gained from his clients in 1979 and during the joint defense meetings. As the district court later found, Reagan Martin's purpose was to plead innocence for himself and point the finger of blame at his clients. Needless to say, Reagan Martin did not seek, let alone obtain, his clients' consent to give the government confidential and privileged information. A United States Federal Bureau of Investigation memorandum of June 4, 1980 documents Reagan Martin's attempt to exculpate himself and steer the government toward his clients:

> Reagan advised that the DOMA—Cosden transaction had been arranged and carried out without his knowledge. He stated that Don Martin would have been the person responsible for setting up this operation. . . .
>
> He advised that he is well aware of the difference in crude oil and refined products; however, he was not aware that DOMA was dealing in refined prod-

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[11] Appendix B at 10a. The district court's opinion notes only the last three meetings. The first was held on August 9, 1979. Ex. 1A at 2-3.

[12] Vol. I at 398; Ex. 1B at 2.

ucts, as their basic function was to purchase and haul crude oil.[13]

The government knew that Reagan Martin had been Martin's personal attorney and counsel to the corporations under investigation.[14] Nonetheless, the government did nothing to discourage Reagan Martin's cooperation. To the contrary, the government continued to meet with him and later arranged to have him testify before the grand jury.[15]

Reagan Martin agreed to appear before the grand jury, obviously in a further effort to save himself and seal his clients' fate. Again, he did not seek, let alone obtain, any waiver from his clients. Nonetheless, he again disclosed confidential and privileged information.[16]

Reagan Martin's efforts bore fruit. On February 2, 1981, a nine-count mail fraud indictment was filed against Martin, DOMA, and Caprock.[17] Reagan Martin, the counsel who provided the prosecution and the grand jury with an ear into the defense camp, was not indicted.

3. The Proceedings Below.

On March 2, 1981, Martin (and the corporate defendants) moved to dismiss the indictments against them because of violations of their Fifth Amendment rights to due process of law and against self incrimination and Sixth Amendment right to effective assistance of counsel. In essence, the motion relied on Reagan Martin's im-

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[13] Ex. 5 at 2.

[14] Ex. 1A at 4-5.

[15] Ex. 4; Appendix B at 11a. It is noteworthy that Reagan Martin attended at least one additional joint defense meeting [on July 23, 1980] after he first conferred with the government.

[16] Ex. 4 at, *e.g.*, 8-9, 21-30, 33-36.

[17] Vol. IV at 1.

proper disclosure of confidential and privileged communications to the government.

The district court granted the motion and dismissed the indictment against the defendants. The court order was based on a finding that Reagan Martin's disclosures had been a principal basis for the grand jury's decision to indict Martin (as well as the corporate defendants):

> There is no doubt the defendants have been prejudiced by this abrogation of the attorney-client privilege and conflict of interest especially since the communications revealed to the government and the grand jury resulted in the return of the indictment. . . . The unique turn of events . . . has denied them fundamental rights under the Constitution.[18]

This dismissal was "without prejudice" to the government's right to reindict, if it could do so without using Reagan Martin's testimony. Defendants moved for reconsideration of the district court order, asking that the dismissal be "with prejudice." On June 5, 1981, the district court denied that motion.

Martin appealed to the United States Court of Appeals for the Fifth Circuit, arguing that a dismissal with prejudice was the only appropriate remedy for the constitutional violations found by the trial court. The government also appealed the dismissal of the indictment but later withdrew their appeal. Six months later, just after Martin (and the other defendants) filed their brief on the merits of the appeal, the government filed a motion to dismiss the defendants' appeal. This motion was considered by the Fifth Circuit along with the appeal itself.

On April 20, 1982, while the motion and appeal were pending, Martin was reindicted in the District Court for the Northern District of Texas. Neither the corporate defendants nor Reagan Martin were indicted.

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[18] Appendix I' at 13a (citations omitted).

On June 2, 1982, the district court entered an order staying all proceedings under the new indictment, pending resolution of the Fifth Circuit appeal. The district court issued the stay because it would be "a definite miscarriage of justice" to compel Martin to defend himself under the new indictment while simultaneously prosecuting the appeal, which, if successful, would negate the need for a trial.[19]

On August 13, 1982, the Fifth Circuit dismissed petitioner's appeal for want of jurisdiction.[20] According to the appellate court, the district court's decision was neither a final decision within the meaning of 28 U.S.C. § 1291 nor a collateral order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.* (*"Cohen"*).[21]

On August 27, 1982, petitioner moved for a stay of mandate. The motion was denied on September 3, 1982, and the mandate issued on that date.

On September 14, 1982, petitioner filed a motion in the district court for a further stay of proceedings in that court pending resolution of this petition. The motion was granted on October 5, 1982.

REASONS FOR GRANTING THE WRIT

1. Summary.

This case presents a significant federal question never previously addressed by this Court: whether a criminal defendant may appeal a district court's dismissal of an indictment "without prejudice," when the dismissal is based upon the court finding prejudicial violations of defendant's Fifth and Sixth Amendment rights and when there is no practical means to prevent the same violations

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[19] Order of Chief Judge Halbert O. Woodward, United States District Court for the Northern District of Texas (June 2, 1982).

[20] *United States v. Martin*, reprinted in Appendix A.

[21] 337 U.S. 541 (1949).

in a second investigation or trial. This issue goes to the sanctity of a client's confidential communications with his attorney. Its resolution will therefore have a profound influence on the scope of protection that courts accord a fundamental constitutional privilege.

This is *not* a case presenting the issue whether a defendant must suffer the inconvenience of a trial in order to vindicate a constitutional right. A court has already determined that Martin's rights have been violated, and the only issue here is the appropriate remedy. Martin claims that the dismissal must be "with prejudice" because there is no practical means to prevent further violations in the forthcoming proceedings before the trial court. Thus, his constitutional rights would again be violated—even if he is acquitted.

Helstoski and *Perlman* should have guaranteed Martin a right to appeal the question whether the district court's order provided adequate relief for proven violations of his constitutional rights. The Fifth Circuit, however, ignored those decisions and denied Martin the right to appellate review. In reaching this conclusion, the Fifth Circuit misconstrued this Court's holding in *Parr v. United States* (*"Parr"*)[22] and departed from principles of appellate jurisdiction established by this Court. Review by this Court is therefore needed to restore the validity of those principles.

2. The District Court's Order Is A Final Decision.

The first principle of appellate jurisdiction involved here concerns the meaning of "final decisions" as that term is used in 28 U.S.C. § 1291. A final decision in a criminal case is usually a conviction and a sentence. *Berman v. United States*, 302 U.S. 211, 212-13 (1937). It is well established, however, that there are situations in which a decision can be final even though there is neither a conviction nor a sentence. *See, e.g., United*

[22] 351 U.S. 513 (1956).

States v. Mock, 604 F.2d 336, 339 (5th Cir. 1979) (defendant can appeal denial of motion urging collateral estoppel if the denial is a "final rejection of a criminal defendant's claim" and would, if reversed, completely bar prosecution); *United States v. Wood*, 295 F.2d 772, 777 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962) (government can appeal denial of motion to restrain state prosecution since the denial was "a final disposition of the Government's claimed right to prevent the prosecution"). These and other decisions reflect this Court's view that "the requirement of finality [in Section 1291] is to be given a 'practical rather than a technical construction'." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974).

By any practical standard, the district court order at issue here is a final decision under Section 1291. Here, like a defendant urging collateral estoppel under *Mock* and the government in *Wood*, Martin claims that certain rights—his Fifth Amendment rights to due process and against self incrimination and his Sixth Amendment right to effective counsel—will be lost if further prosecution is not barred. Martin is not simply trying to avoid the inconvenience of trial; he is seeking an appropriate remedy from a court order which terminated a case because his constitutional rights had been violated.[23] Martin's appeal, in short, is not to determine whether his rights have been violated but whether the court provided an adequate remedy for proven violations.

Martin contends that the remedy provided by the district court is not adequate. There is no practical way by which any court can divest the government of privileged information it acqured from Reagan Martin; and there

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[23] The issuance of this order distinguishes this case from *United States v. Hollywood Motor Car Co., Inc.*, —— U.S. ——, 102 S.Ct. 3081 (1982) and other similar appeals of interlocutory orders, because in those cases, the lower court *rejected* the claim of constitutional violation and was prepared to move forward with the trial.

is no practical way by which any court can prevent the further use and disclosure of that privileged information in a trial. This point was explained by the Third Circuit when it dismissed a prosecution *with prejudice* because the government had improperly acquired information relating to privileged attorney-client communications:

> The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses.

United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978). Here, as in *Levy*, Martin claims that the only effective remedy for proven violations is to dismiss the indictment with prejudice.[24]

The Fifth Circuit may ultimately reject the approach in *Levy* and similar cases on the remedy issue.[25] How-

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[24] It should be noted that the reindictment of Martin was presided over by the same prosecutor who presented Reagan Martin's illegal testimony to the original grand jury and argued against dismissal of the first indictment.

[25] In addition to *Levy*, *see United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) (if "there was continuing prejudice which could not be remedied by a new trial or supression [then] . . . more drastic treatment [is] called for"); *Hoffa v. United States*, 385 U.S. 293, 308 (1966) (citation omitted) ("It is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the counsels of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment."); *United States v. Valencia*, 541 F.2d 618 (6th Cir. 1976) (dismissal of an indictment, with prejudice, would be appropriate if the intrusion into the defendants' attorney-client privilege prejudiced them); *United States v. Bowers*, 517 F. Supp. 666 (W.D. Pa. 1981); *United States v. Peters*, 466 F. Supp. 364 (S.D. Fla. 1979).

ever, there should be no doubt about the right to appeal that issue. Certainly, the right to appeal would exist in a civil case if a party complained about the relief afforded after a determination of liability. There is no reason to treat this criminal case any differently.

The Fifth Circuit, however, held that the district court's order in this case was not final under Section 1291, because there was no conviction. But none of the cases cited by the Fifth Circuit involved a factual situation like the one presented here. More specifically, none of the cases concerned the dismissal of an indictment because of prejudicial violations of the defendant's constitutional rights.

The most significant case cited by the Fifth Circuit is *Parr v. United States*, *supra*. In that case the district court granted Parr's motion to transfer his criminal case to another division within the same judicial district. Shortly after this transfer, the government obtained a new indictment against Parr for the same offenses in a different judicial district and moved for leave to dismiss the first indictment. The motion was granted over Parr's vigorous opposition, and Parr appealed to the Fifth Circuit. The appellate court dismissed Parr's appeal because he was not aggrieved by the dismissal and, therefore, the order appealed from was not final. This Court affirmed.

Parr is completely different from the case at issue here. There the dismissal was based on a prosecutor's voluntary request; here the dismissal was based on court findings that Martin's constitutional rights had been violated. In *Parr* there could be no harm to the defendant until he was convicted; here, in contrast, Martin will necessarily have to suffer further disclosures of confidential and privileged communications—even if he is later acquitted. In short, *Parr* is based on the broad discretion accorded to federal prosecutors in initiating criminal proceedings. Martin's case, in contrast, is based on the

need to vindicate and prohibit further violations of Martin's constitutional rights. For this reason, *Parr* does not control the determination of whether the district court's order in this case is final.[26]

3. The District Court's Order Is An Appeable Collateral Order.

The second principle of appellate jurisdiction involved here concerns the kind of collateral order that can be appealed. Even assuming, *arguendo*, that the district court's order here is not final under the traditional Section 1291 analysis, it is plainly final under *Cohen*. Though sometimes cited as an "exception" to Section 1291, *Cohen* is actually an application of the Court's practical view of Section 1291's "finality" requirement. Specifically, these cases involve certain "collateral orders" considered "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

In order for a collateral order to be appealable, three factors must be met. First, the trial court decision must fully dispose of the question. Second, the decision must be collateral to the question of defendant's innocence or guilt. Third, the decision must involve an important right which would be irreparably lost if review were deferred. The district court's order in the instant case meets each of these three criteria.

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[26] The two other cases cited by the Fifth Circuit on this point involved facts similar to those confronting the Court in *Parr*. *See United States v. Arzate*, 545 F.2d 481 (5th Cir. 1977); *United States v. Lanham*, 631 F.2d 356 (4th Cir. 1980), *cited in* Appendix A at 3a. Neither of these later decisions add anything to the discussion on finality provided in *Parr*.

If *Parr* can be viewed as broadly holding that a dismissal of an indictment is *never* a final decision, even when based on constitutional violations, the case is plainly at odds with *Helstoski* and *Perlman*, *see infra* at 14-16, and should be overruled to that extent.

As acknowledged by the Fifth Circuit, *Cohen's* first factor is met in this case, because "the district court conclusively determined that the defendants' constitutional rights were violated." [27]

The second factor—that the dispute be collateral to the issue of guilt or innocence—is also satisfied. Martin sought dismissal with prejudice at the trial court level because his attorney, with the active encouragement of the government, disclosed privileged communications. In none of his pleadings did Martin discuss his guilt or innocence. The district court's opinion similarly contains no discussion of the merits. In short, the issue here is Martin's right to communicate freely with his attorney—not whether he committed any alleged crime.

In these respects, then, this case is virtually identical to *Helstoski*. In *Helstoski*, a Congressman moved the district court to dismiss an indictment because it relied on congressional speech that was privileged under the Speech and Debate clause. The district court denied Helstoski's motion, and he petitioned the Court of Appeals for a writ of mandamus directing the district court to dismiss the indictment. The appellate court declined to issue the writ. On certiorari, this Court held that the dismissal order was an appealable collateral order and that Helstoski should have taken a direct appeal to the Court of Appeals. This Court stated that the question was whether congressional speech was privileged from disclosure—not whether the Congressman was guilty of the crime charged. The Court added that, if a Congressman or Senator "is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be revieweable before . . . exposure [to trial] occurs." 442 U.S. at 508, *citing Abney v. United States*, 431 U.S. 651, 662 (1977). In other words, because the

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[27] *United States v. Martin*, Appendix A at 4a.

communications in *Helstoski* were privileged, the defendant was afforded a right to appeal in order to preserve the sanctity of the privilege.

Like *Helstoski*, Martin's case involves the protection of privileged communications. Like the defendant there, Martin is concerned that any trial will result in violations of his communications privilege. And, like the defendant in *Helstoski*, Martin should have a right to pursue an appropriate remedy in an appeal.

The Fifth Circuit, however, stated that Martin's complaint was "intertwined with guilt" because, like Fourth Amendment motions to suppress, "the issue here ultimately concerns what evidence will be used against the defendant . . ."[28] But the Fifth Circuit did not cite, let alone discuss, *Helstoski*—a case which necessarily distinguishes Fourth Amendment pretrial motions from those motions designed to protect the sanctity of privileged communications. If it had confronted that case, the Fifth Circuit would have been compelled to conclude that the issue of privilege presented here, as in *Helstoski*, is entirely collateral to the issue of guilt or innocence.

Lastly, the third factor in *Cohen*—that the decision involve an important right which would be irreparably lost if review is deferred—is clearly present here. As noted above, there is no practical way to divest the government of the information it acquired from Reagan Martin and, therefore, no way to prevent the use and disclosure of privileged information at trial. Deferral of appellate review until trial will not only fail to prevent these disclosures; it may result in an absolute denial of *any* appellate review since Martin could be acquitted.

To this extent, Martin's posture is comparable to that of an individual who seeks to quash a subpoena that would, if honored, allow access to privileged information.

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[28] *United States v. Martin*, Appendix A at 4a.

For example, if a grand jury subpoena is directed to a third-party custodian of another party's documents, the owner is unable to refuse compliance and test the issue in collateral contempt proceedings. For this reason, this Court has, for over sixty years, held that the owner may appeal a district court's order directing third-party custodians to disclose documents over which the owner claims a privilege. *Perlman v. United States, supra.*

In *Perlman*, this Court reviewed a district court order granting the government's access to appellant's documents, which were in the custody of the clerk of the court. The lower court's order did not terminate the litigation. Nonetheless, this Court held that the order was final and could be appealed by the potential defendant, who claimed the documents were privileged under the Fourth and Fifth Amendments. The Court rejected the government's contention that the lower court order was interlocutory and, therefore, not subject to appeal:

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In order words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

247 U.S. at 13. *See In re Berkley & Company*, 629 F.2d 548 (8th Cir. 1980) (an owner of privileged documents can appeal an interlocutory order which requires a third-party custodian to disclose the documents to a grand jury).

Martin is in the same position as the appealing parties in *Perlman* and its progeny. In effect, he seeks to prevent the government from disclosing information that is privileged to him.

Martin's right to appeal here is not affected by this Court's recent decision in *United States v. Hollywood Motor Car Co., Inc., supra.* That case involved the defendants' motion to dismiss an indictment because of alleged prosecutorial vindictiveness. The Court said that, absent conviction, defendants were not aggrieved and, therefore, could not appeal the denial of the motion. Unlike *Helstoski* and this case, then, the Court in *Hollywood Motor Car* did not have to confront the constitutional violations that had occurred and/or would occur even if the defendants were acquitted. Like the claim in *Helstoski*, then, Martin's claim is "one that must be upheld prior to trial if it is to be enjoyed at all." *United States v. Hollywood Motor Car Co., Inc., supra,* 102 S.Ct. at 3085.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DON MARTIN, DOMA CORPORATION and
CAPROCK SERVICES CO[illegible]NY,
Defendants-Appellants.

Aug. 13, 1982

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge and GEE and GARZA, Circuit Judges.

PER CURIAM:

The defendants appeal the district court's dismissal without prejudice of a nine count indictment charging them with mail fraud. They contend the dismissal should have been with prejudice. Because there has been no final decision within the meaning of 28 U.S.C. § 1291, we dismiss for lack of jurisdiction.

The essential facts necessary to understand today's disposition are as follows. The defendants were investigated concerning fraudulent oil transactions. It was alleged that they invoiced a customer for virgin crude oil when in fact they had delivered lesser quality oil. During the course of investigations by the Departments of Energy and Justice and a grand jury, legal counsel for the defendants, Reagan Martin, divulged information implicat-

ing his clients. They were subsequently indicted. The district court found Martin's testimony to be a clear breach of the attorney-client privilege. The court granted the defendants' motion to dismiss the indictment, finding that this breach denied the defendants their right to effective assistance of counsel as guaranteed by the sixth amendment, and a denial of due process as guaranteed by the fifth amendment. However, the dismissal was without prejudice to the government's right to seek a new indictment based on evidence not based on or derived from any breach of the attorney-client privilege. The defendants filed this appeal, asserting that a dismissal with prejudice was the only appropriate remedy for the constitutional violations found. The government also appealed the dismissal of the indictment but withdrew its appeal. It then filed a motion to dismiss the defendants' appeal which we now consider. While that motion was pending before this court, the government obtained a new indictment of Don Martin.[1]

In the context of a criminal prosecution, finality normally comes with the imposition of sentence. *Flynt v. Ohio*, 451 U.S. 619, 101 S.Ct. 1958, 1959, 68 L.Ed.2d 489 (1981); *Parr v. United States*, 225 F.2d 329 (5th Cir. 1955), *aff'd*, 351 U.S. 513, 518, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956). The matter which the dismissed indictment sought to put in controversy here was the defendants' guilt of the crime of mail fraud. *See Parr v. United States*, 225 F.2d at 332. Dismissal of the indictment prevented that issue from being reached. Since it was not reached or decided there is nothing from which to appeal. Whether the dismissal leaves the defendants open to further prosecution or whether the dismissal ought to bar prosecution altogether has no effect on appealability.

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[1] The government moved to dismiss the appeal of the defendant corporations as moot based on the fact that they were not reindicted by the grand jury and would not be prosecuted further by the government. We need not decide this issue.

Parr v. United States, 351 U.S. at 517, 76 S.Ct. at 915. Any testing of the dismissal order must abide the outcome of a trial on the issue of guilt. Then, if convicted, the defendants may be aggrieved. *Id. See United States v. Lanham*, 631 F.2d 356 (4th Cir. 1980) (dismissal of indictment without prejudice not appealable, citing *Parr v. United States*). *See also United States v. Arzate*, 545 F.2d 481 (5th Cir. 1977).

The defendants' claim that this situation comes within the collateral order exception to the final judgment rule first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), is untenable. To begin with, the major decisions applying *Cohen* to criminal cases have involved *denials* of motions to dismiss indictments. *See, e.g., United States v. MacDonald*, 435 U.S. 850, 851, 98 S.Ct. 1547, 1548, 56 L.Ed. 2d 18 (1978) (denial of motion to dismiss based on speedy trial grounds); *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (denial of motion to dismiss based on double jeopardy grounds). A denial of a motion to dismiss leaves a defendant in the throes of a prosecution. It is therefore distinguishable from a dismissal, the effect of which is to leave the matter as if no suit had been filed. While the denial of a motion to dismiss may leave a defendant aggrieved, a dismissal does not. Arguably, appealability may be undercut by this alone. *See Parr v. United States*, 351 U.S. at 517, 76 S.Ct. at 915.

Putting aside the question of "aggrievement," application of the factors announced in *Cohen* does not support jurisdiction here. These factors are: 1) the order must fully dispose of the matter in dispute; 2) the order must not be simply a step toward final disposition of the merits of the case which would be merged in final judgment; rather it must resolve an issue completely separable from and collateral to the cause of action asserted; and 3) the decision must involve an important right which would be

lost irreparably if review had to await final judgment. 337 U.S. at 546, 69 S.Ct. at 1225. *See Abney v. United States*, 431 U.S. at 658-59, 97 S.Ct. at 2039-2040 (summarizing the *Cohen* factors). *Abney* found all of the Cohen factors present in order to support appellate jurisdiction. We have disallowed appeals where less than all of the factors were present. *United States v. Rey*, 641 F.2d 222, 224 (5th Cir.), *cert. denied*, —— U.S. ——, 102 S.Ct. 318, 70 L.Ed.2d 160 (1981).

Such a situation is present here. As in *Rey*, the first factor is met—the district court conclusively determined that the defendants' constitutional rights were violated. Likewise, the dismissal of the indictment fully disposed of that indictment. However, neither of the other two *Cohen* factors are present.

Defendants complain that the government has obtained evidence from the breach of the attorney-client privilege. The complaint is not well taken. For purposes of appealability, this case is indistinguishable from the denial of a suppression motion. Both situations address the issue of what evidence the government has procured, and how it has procured it. Evidentiary issues in criminal cases are normally intertwined with the basic issue of guilt. *Cohen* requires the dispute to be completely collateral. For this reason appeals may not be taken from the denial of pre-trial motions to suppress evidence. *Di Bella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962); *Cogen v. United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (1929); *United States v. Mock*, 604 F.2d 336, 339 (5th Cir. 1979). Because the issue here ultimately concerns what evidence will be used against the defendant, we apply the same rule, even though this case is cast in sixth rather than fourth amendment terms. The defendants assert that the wrongful acts of their attorney, and the government's exploitation of those acts, have prejudiced the conduct of their defense. But this complaint is intertwined with guilt. It is not clearly col-

lateral. *United States v. MacDonald*, 435 U.S. 850, 859, 98 S.Ct. 1547, 1552, 56 L.Ed.2d 18 (1978) (denial of motion to dismiss on sixth amendment speedy trial grounds not appealable).

Cohen's third factor is not met either. The defendants do not claim, nor could they, a right not to be indicted a second time. *Compare Abney v. United States*, 431 U.S. 651, 659-660, 97 S.Ct. 2034, 2040-2041, 52 L.Ed.2d 651 (1977) (the denial of dismissal on double jeopardy grounds is appealable under *Cohen* because the denial order is collateral to guilt and the defendant's right not to be tried twice would be lost absent appeal). Rather, "the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Parr v. United States*, 351 U.S. at 519-20, 76 S.Ct. at 916-917.

Similarly, the defendants' and amicus' claim of government misconduct in knowingly exploiting the breach of the attorney-client privilege is neither separable from the issue of guilt, nor an issue which cannot be dealt with fully and fairly on an appeal from judgment. *United States v. Rey*, 641 F.2d 222, 224 (5th Cir. 1981); *United States v. Gregory*, 656 F.2d 1132, 1135-36 (5th Cir. 1981) (denial of motion to dismiss based on prosecutorial vindictiveness not appealable).

The third factor in *Cohen* requires that the district court's decision involve an important right which would be lost without immediate appellate review. 337 U.S. at 546, 69 S.Ct. at 1225. The defendants argue that they meet this factor because they will be irreparably harmed by the further disclosure of privileged information in a second prosecution, or by further use of information already disclosed. That is not the case. The defendants acknowledge that the dismissal without prejudice left the parties as if no action had ever been filed. The district court explicitly restricted the government in the scope of evidence it could use to seek a second indictment. In

terms of trial, the defendants have available to them all the legal tools for preventing unwarranted disclosures that any defendant would have. The proper use of those tools is addressed to the district court during the course of the new proceedings. To the extent damaging disclosures have already been made public, no appeal, now or later, can aid the defendants.

Finally, the defendants argue that they have been greatly inconvenienced by the government's belated motion to dismiss. They contend also that having prepared briefs, both parties' convenience will be served by allowance of this appeal. These arguments miss the mark. This is a court of limited statutory jurisdiction. Neither the convenience of parties nor court may confer the right of review. *United States v. MacDonald*, 435 U.S. at 857 n.6, 98 S.Ct. at 1551 n.6.

APPEAL DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ABILENE DIVISION

Criminal No. CR-1-81-1

UNITED STATES OF AMERICA

v.

DON M. MARTIN, DOMA CORPORATION AND CAPROCK SERVICES COMPANY, INC.

ORDER

Defendants have filed motions, with supporting briefs, and the government has filed briefs in opposition to said motions. Two hearings have been held, the second being in Lubbock, Texas on the 16th and 17th days of April, 1981, with all counsel present. After hearing and considering the motions, the briefs and arguments of counsel, the court enters the following orders:

I

The motions by the corporate defendants to adopt motions filed by the individual defendant is GRANTED.

II

The motion of the defendants to dismiss the indictment for duplicitousness is DENIED.

III

The motion of the defendants to dismiss the indictment on the grounds that 18 U.S.C. § 1341 has been preempted by the Congressional enactment of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §§ 752, *et seq.*, is DENIED.

United States of America v. Lang, —— F.2d —— (TEC 1981).

IV

The motion of the defendants to dismiss the indictment for failure of the indictment to charge an offense is DENIED.

V

The Motions Of The Defendants To Dismiss The Indictment For Violation Of The Defendants' Fifth and Sixth Amendment Rights

This case involves a nine-count indictment charging the defendants with violations of 18 U.S.C. § 1341 and § 2 with respect to the nine allegedly fraudulent invoices mailed on separate dates to Cosden Oil & Chemical Company (Cosden) of Big Springs, Texas. In brief, the indictment alleges that instead of delivering crude oil as represented by the invoices, defendants actually delivered HIFO, a product having a less value than crude oil; defendants then charged Cosden, the purchaser, for the higher priced crude.

The sequence of events, as shown by the evidence at the evidentiary hearing on this motion, and which is necessary to determine this motion, is as follows:

In 1973 Defendant DOMA Corporation, located in Abilene, Texas, was incorporated by Defendant Don Martin and his cousin Reagan Martin who is not subject to the indictment. Each of the Martins owned fifty percent of

the stock in DOMA.[1] The other corporate defendant, Caprock Services Company, Inc., was subsequently acquired by DOMA as a wholly-owned subsidiary.

Since incorporation, Don Martin has been the president and chief operating officer of DOMA while Reagan Martin has served as chairman of the board, vice president, and secretary-treasurer. Additionally Reagan Martin has acted as the attorney for the corporation which has included duties such as maintaining the corporate records, counselling on business decisions, negotiating agreements with DOMA and others, and arranging financing when needed for DOMA. The record also indicates that Reagan Martin handled the preparation of division orders, determined ownership of the crude purchased, and supervised and secured the services of other attorneys when he desired outside legal assistance.

Aside from his role as corporate counsel, Reagan Martin also acted as personal counsel for Don Martin commencing in 1971. He has been a member of the Texas Bar since 1961 and although his offices are located in Dallas, Texas he visited Abilene on several occasions to attend to the affairs of DOMA as well as those of Don Martin. Reagan Martin's representation of Don Martin as an individual consisted of consultation concerning a will, a trust agreement, a real estate transaction, and a sale by Compton Corporation of various properties which eventually ended up in DOMA.

In July of 1978, Cosden disputed one of the invoices sent by DOMA stating that HIFO had been delivered rather than the crude oil which was purchased. When this matter was called to the attention of Don Martin he immediately requested Reagan Martin to come to Abilene. Reagan Martin arrived in Abilene within two or three days and consulted with Don Martin about Cosden's alle-

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[1] Reagan Martin controlled this stock although it was actually in trust for his children.

gations. Although it was in dispute at the hearing, the court determined that the conversations between Don Martin and Reagan Martin on this occasion were between the two of them alone to the exclusion of any third party. This finding is in accordance with the testimony of Doug Grissom, a former employee of DOMA. During this July meeting, Reagan Martin inquired as to the nature of the allegations by Cosden and asked if there was an accident or other innocent mistake. He finally advised that DOMA issue a credit memo to Cosden in the amount of $90,000.00. In counselling with Don Martin, he indicated that by issuing the credit memo civil litigation as well as criminal charges could be avoided.

The Department of Energy (DOE) commenced an audit of the affairs of the defendants which resulted in hearings before the DOE on October 24, 1978 and April 10, 1979. Reagan Martin and Don Martin were present at both hearings and the record is clear that at each hearing Don Martin acknowledged Reagan Martin as his attorney and Reagan Martin did in fact represent Don Martin as an attorney in these hearings. While testifying at the DOE hearings, Reagan Martin, as counsel, revealed, at least in part, the private conversations and consultations he had with Don Martin in July of 1978.

The firm of Williams and Connolly, Washington, D.C., was subsequently employed to represent all three of the defendants herein and also Reagan Martin. Three meetings were held on February 25, 1980, March 19, 1980, and July 23, 1980, with the defendants; Reagan Martin and his attorney; and members of the firm of Williams and Connolly in attendance. These meetings were for the purpose of preparing the joint defense of all of the parties with respect to anticipated criminal charges.

Finally, this unusual sequence of events culminated with the appearance of Reagan Martin before a grand jury on August 6, 1980. On that occasion Reagan Martin

gave sworn testimony relating to his conversations and advice to Don Martin in the July 1978 meeting. This testimony has been examined by the court and without doubt it had a very strong influence or perhaps the principal influence on the grand jury in returning the indictment in question. His testimony was extremely incriminating as to each of the defendants. It is unclear whether Reagan Martin revealed to the grand jury any of the conversations, advice or counsel that were received from the joint defense meetings with Williams and Connolly. However, it appears there is a presumption that subsequent testimony, following consultations with an attorney, would have revealed confidences protected under the attorney-client privilege. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976).

Defendants have moved to dismiss the indictment contending violations of their Fifth and Sixth Amendment rights. Specifically, the defendants claim that Reagan Martin breached the attorney-client privilege by divulging information given to him in the July 1978 meeting and the joint defense meetings. The final contention is that Reagan Martin, while representing the defendants as their attorney, was hopelessly caught in a conflict of interest. He allegedly failed to advise his clients of their right to claim the privilege and when testifying under oath gave facts which exonerated him from criminal liability but which incriminated the defendants. These actions are alleged by the defendants to constitute ineffective assistance of counsel and a denial of due process in violation of the Fifth and Sixth Amendment to the Constitution of the United States.

Based upon the following findings, the court agrees with defendants and finds the motion to dismiss has merit and should be granted.

Reagan Martin was the corporate counsel for the two corporate defendants in this case and was representing them as counsel from the date of incorporation of DOMA

through the date of his testimony before the grand jury on August 6, 1980.

Reagan Martin was also counsel for Don Martin, and as his personal attorney, represented him on many occasions including the hearings before the DOE. The court finds that he acted as lawyer and counsel for Don Martin personally and the two corporate defendants in July of 1978 when he was called to Abilene to advise with respect to the allegations received from Cosden. While it is recognized that Reagan Martin has a business interest in these transactions, he was acting in the capacity of an attorney at law on behalf of the defendants in this case and advised them as to a course of action to be taken both civilly and as a possible way to avoid criminal charges. *See e.g. U.S. v. Lipshy*, 492 F.Supp. 35 (N.D. Tex. 1979).

The government's contention that these defendants have waived their right to assert the attorney-client privilege is not supported by the evidence. Without determining whether the privilege may have been waived by Don Martin's attendance at the DOE hearings and his silence on that occasion, there is no evidence of any waiver of the privilege when Reagan Martin testified before the grand jury. Even had there been a waiver of the privilege at the DOE hearings, which the court does not find one way or the other, there still is no evidence of any waiver with respect to the confidences divulged during the joint defense conferences with the firm of Williams and Connolly. The court concludes it is reasonable to believe that the facts and law were fully discussed at these conferences and therefore, it is also reasonable to believe that Reagan Martin, in telling his full story before the grand jury, did reveal a portion of either the thought processes or the facts discussed in the joint defense conferences.

In addition to violating the attorney-client privilege, Reagan Martin also violated the canons of ethics by purposefully involving himself in a serious conflict of interest situation. Such conflict arose when Reagan Martin, as an

attorney for the defendants, sought to give his statement to an agent of the FBI and to present his testimony before the grand jury. His statements on these occasions were clearly made for the purpose of exonerating himself from any criminal liability, and as indicated above did incriminate his clients.

The Sixth Amendment provides that the accused shall enjoy the right to have assistance of counsel. Free two-way communications between attorney and client is essential if the professional assistance guaranteed by the Sixth Amendment is to be meaningful. *U.S. v. Morrison*, 49 U.S.L.W. 4087 (Jan. 13, 1981); *U.S. v. Levy*, 577 F.2d 200, 209 (3rd Cir. 1978). When a lawyer testifies as to his communications with his client, as did Reagan Martin in this case, with no waiver from the client of the privilege, and at the same time gives testimony in behalf of his own interests and against those of his clients, such actions amount to a deprivation of effective assistance of counsel to the clients and a resulting denial of these clients' Fifth and Sixth Amendment rights. *See Weatherford v. Bursey*, 409 U.S. 545 (1977). There is no doubt the defendants have been prejudiced by this abrogation of the attorney-client privilege and conflict of interest especially since the communications revealed to the government and the grand jury resulted in the return of the indictment. *See U.S. v. Kilkrain*, 566 F.2d 979 (5th Cir. 1978) *cert. denied* 439 U.S. 819; *U.S. v. Franklin*, 598 F.2d 954 (5th Cir. 1979) *cert. denied* 444 U.S. 870.

The unique turn of events has resulted in prejudice to the defendants and has denied them fundamental rights under the Constitution. *Messalt v. Alabama*, 595 F.2d 247 (5th Cir. 1979); *U.S. v. Morrison*, *supra*; *U.S. v. Levy*, *supra*. Therefore, in the face of this record, the court, exercising its supervisory powers, must dismiss the indictment for the taint that has been placed on all of these proceedings by the privilege violation and the conflict of interest.

Evidence in the record indicates to the court that before the grand jury testimony of Reagan Martin, and before his statement to the FBI, that the facts of his testimony were already well known to the government. Further the government has indicated that they did not intend to use any of the testimony obtained at the DOE hearings. If the government has in fact obtained sufficient information to indict without the use of the testimony of Reagan Martin, justice requires that this dismissal be made without prejudice.

It is therefore ordered that the indictment by the Grand Jury in this case against each defendant be quashed and dismissed without prejudice.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 23rd day of April, A.D. 1981.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas